No. 13,042

United States Court of Appeals

For the Ninth Circuit

DOUGLAS HEAY,

Appellant,

vs.

DEAN PHILLIPS, CHARLES GRAY and JAMES KELLY,

Appellees.

BRIEF FOR APPELLEES.

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STATEMENT OF PLEADINGS AND ABSTRACT OF CASE.

The statement of pleadings and abstract of case as specified by appellant is substantially correct and call for no further comment.

ARGUMENT.

The appellees herein will agree that as a general rule of law a party litigant is entitled to a continuance upon request where a turn in the proceedings operates to his surprise and to his prejudice; however, the grant of a continuance rests in the sound discretion of the court and will not be disturbed unless

such discretion is abused. Surprise of such a nature as to warrant an appellate tribunal in finding that the trial court abused its discretion must be of such nature that counsel was, in fact, prejudiced or injured in the preparation and submission of his case. *Jennings v American President Lines,* 143 Pac 2d 329, 61 Calif App 2d 417; *State v Price,* 131 SE 710, 100 W Va 699; *Gidionsen v Union Depot RR Co.,* 31 SW 800, 129 Mo 392; *Henderson v Hazlett,* 83 SE 907, 75 W Va 255; *Brandt v Krogh,* 111 Pac 275, 14 Calif App 39; *Porter v Anderson,* 113 Pac 345, 14 Calif App 716; *Horn v United Securities Co.,* 81 Pac 1009, 47 Ore 35.

The fundamental principle running throughout the subject of continuances is that the granting or refusal of a continuance rests in the discretion of the court to which the application is made. Its ruling in reference thereto will not be disturbed by an appellate tribunal unless an abuse of discretion is shown. 12 *Am Jur* Continuances, Sec. V, p 450, 451 and footnotes. Surprise alone is not sufficient. 12 *Am Jur* Continuances, Sec. 19, p 461. A continuance is not a matter of "right". Satisfactory cause must be shown. *Wood & B Co. v Hewitt Lbr. Co.,* 89 W Va 254, 109 SE 242, *Adams v Adams,* 79 W Va 546, 92 SE 463.

We turn then to the question of whether counsel for the appellant was, in fact, surprised at the trial of this cause. On the 7th day of May at or about the hour of 10:00 o'clock A.M., counsel for appellees requested permission of the trial court to file an

amended complaint setting out a separate and alternative cause of action in negligence. At that time counsel for appellant made the following statement:

> "Mr. McNabb, I assume you are alleging negligence now. Is that correct?" (T.R. 49.)

Such statement negatives any claim by appellant that he was surprised in fact. A further examination of the transcript of record at pages 49, 50 and 51 will disclose that counsel for appellant forthwith requested a continuance of an undetermined length and failed to specify to the court when, if ever, he would be prepared to meet the new issues.

The court was then advised that plaintiff Phillips would not be available to testify in support of his complaint if any undue delay were caused. The court will note on page 51 of the transcript of record the absence of any objection to the cause being reset for 10:00 o'clock on the 8th day of May, 1951.

On the 8th day of May, for reasons best known to himself, counsel for appellant filed and argued a motion to dismiss an alternative motion to strike the second cause of action in plaintiff's second amended complaint and then orally moved the court for a three day continuance, which motion was not supported by affidavits and based only on the ground that there "still remains some work for me to do to reduce my notes, etc. to a proper working order." (T.R. 51, 52 and 53.)

In his motion counsel for appellant requested a three day continuance. (T.R. 54.) The court should

bear in mind that counsel had previously been advised that it would be impossible for plaintiff Phillips to remain in Fairbanks for the trial of this cause for any extended period. In opposing the motion for the continuance, counsel for the plaintiff advised the court as follows:

> "However, at this time I request the court that we proceed in this matter, in that as I stated to the court yesterday, our principal witness must return to Naknek, the place of his employment, and if this matter is continued for three days at this time, it is for all practical purposes the same as continuing the matter until next November, or the next term of Court." (T.R. 54.)

In reply counsel for appellant stated as follows:

> "Now, I am sympathetic with plaintiff's position that this cause may have to be continued until next November because of Mr. Phillip's employment; but where does the responsibility rest for any necessity of continuing this matter until next November?"

And further,

> "Therefore, the matter may be adjourned beyond three days as far as I am concerned. Whenever Mr. Phillips can come back up here to try this cause, but I can't see why I should be forced to go to trial to the prejudice of my client, regardless of my own personal feelings in this abrupt manner." (T.R. 55.)

In the latter quotation, we find the only reference made by counsel for appellant to prejudice. No show-

ing of any injury, surprise or prejudice was made. No affidavits were presented for the court's consideration. No statement was made concerning the unavailability of witnesses. In fact, an examination of pages 56, 57 and 58 of the transcript of record will indicate that counsel for appellant neither objected to the court's refusal to grant a three day continuance, nor did he state to the court that he was not in fact ready and prepared to proceed with the trial of this cause.

Appellant and appellees herein are in accord on the proposition that a motion for a continuance is addressed to the sound discretion of the trial court. The decision of the trial court will be disturbed on appeal only for an abuse of discretion. *Goodyear Service v Pretsfelder,* 84 F 2d 242, 1936; *Harrah v Morgantheau,* 89 F 2d 863, 1937; *Virginia Beach Bus Line v Campbell,* 73 F 2d 97, cert. den. 55 Sup Ct 637, 1934; *Sanders v Hall,* 74 F 2d 399, cert. den. 55 Sup Ct 653, 1935; *Southern Kansas Stage Lines v Gibson,* 87 F 2d 23, 1937. See also 12 *Am Jur* Continuances, Sec. V, p 450, 451 and footnotes.

The mere fact that the time for preparation for trial has been short is not in itself grounds for a continuance where it is not known that the defendant has been deprived of the testimony of absent and material witnesses or that the court's discretion has been otherwise abused. 12 *Am Jur* Continuances, Sec. IX, p 454.

Where the counsel does not offer to show that an amendment presents an issue which he is not fully prepared to meet or that he has not at hand and is ready to introduce all the evidence available in support of the defense, a continuance is properly refused. *Downes v. Cassidy,* 47 Mont 471, 133 Pac 106. In the case of *Gilbert v Lachapelle, et al,* 127 F 2d 750, the court said,

> "This appeal is brought to have us declare the action of the trial court an abuse of discretion. No rule is more firmly established than that the decision on matters relating to the time of trial is exclusively within the province of the trial court. By the very nature of things that court is more full handed of the facts than we can be by an inspection of the record and unless there has been a clear abuse of discretion, we will not reverse."

Citing *Knowles v Blue,* 95 So 481; *Virginia Beach Bus Line v Campbell,* 73 F 2d 97. The court said further,

> "It is only when a final judgment on the merits has been rendered that the order refusing the continuance may be examined in its true perspective, and the rights of the parties fairly weighed."

An error must be deemed harmless if on examination of the entire record, substantial justice has resulted to the parties. *Morton Butler Timber Co.,* 91 F 2d 884, 1937.

The burden is on the appellant, not only to prove error, but that it was prejudicial. *Smith v US,* 63 F 2d 252, 1933; *In re Schulte-United,* 59 F 2d 553, 1932; *Automotive Underwriters of Des Moines, Iowa v Bloemer,* 94 F 2d 474, 1938.

For error to be reversible the burden is on the complaining party to show from the record as a whole the denial of some substantial right. *Schritchfield v Kennedy,* 103 F 2d 467, 1939. In the case of *Virginia Beach Bus Line v Campbell,* 73 F 2d 97, 1934, the court said,

> "The point urged as to the abuse of discretion by the trial judge is based principally upon the refusal to grant the defendant a continuance. In approaching this question, we must bear in mind that the question is not whether the trial judge should have granted a continuance. That is a matter which the law leaves to his judgment and not that of the appellate court. Whether a continuance shall be granted or not is a matter resting in his sound discretion and the appellate court has no power to interfere with the exercise of that discretion unless it has been abused by the trial judge."

Cox v Hart, 145 US 376; *US v Rio Grande Dam and Irrigation Co,* 184 US 416; *Speers Sand & Clay Works, Inc. v American Trust Co.* 52 F 2d 831, 1931; *Pocahontas Distilling Co. v. US,* CCA 218 F 782; *Lyman v Warner,* CCA 113 F 87; *Coltrane v Templeton,* CCA 106 F 370; *Richmond RR & Electric Co. v Dick,* CCA 52 F 379; *Panama RR Co. v. Pigott,* CCA

256 F 837; *Texas & Pacific RR Co. v Humble,* CCA 97 F 837.

"Further, we do not feel that under the circumstances here it can properly be said that there was an abuse of discretion on the part of the district judge in refusing a continuance. Of course, counsel assumed that after the March term in Elizabeth City that there would be no further term until September, but that on calling the special term in May, the judge had the clerk notify counsel that it had been called so that they would be ready to try their cases at that time. That counsel for defendant did not receive the notice was due to the fact that he was in Washington and his mail was not properly forwarded to him. Plaintiff was not responsible for this and was on hand with his witnesses at considerable expense. The case was continued until Thursday to give the defendant's attorney an opportunity to be present and he was present with his associates and witnesses and tried the case. The only absent witness that he indicated a desire to have present was one who had procured the release which was attacked. That it may well have appeared to the trial judge, as it does to us, that this witness would not have been of value to the defendant if he had been present. *In view of the inconvenience and expense which a continuance would have caused plaintiff, we cannot say that it was an abuse of discretion to refuse to continue for the absence of a witness of such doubtful value to defendant.* A careful examination of the record convinces us that defendant was in nowise prejudiced by not having him present. *Defend-*

ant did ask for a continuance but did not show any necessity therefor. It did not show wherein it was unable to meet the facts pleaded by the amendment; it did not produce witnesses to contradict the evidence and made no contention that it could produce other evidence on the question if granted a continuance. There was no showing of prejudice."

In *Goodyear Service Inc. v. Pretsfelder,* 84 F 2d 242, CCA, Dist. of Columbia, 1936, in ruling upon an alleged error in refusing a continuance, the court, among other things, said as follows:

> "And the granting of a continuance of one month, as requested, would have resulted in the postponement of the trial of the cause until the following term of court; wherefore, we feel that the ruling of the lower court upon this subject should not be disturbed."

Citing *Isaacs v US,* 159 US 487; *Fields v US,* 27 App DC 433; *Moens v US,* 50 App. DC 15, 267 F 317; *Howes v Clark,* 24 Pac 116; *Dale v Beasley,* 81 SE 849.

In *Keener Oil and Gas Co. v. Bushong,* 56 Pac 2d 819, Supreme Court of Oklahoma, 1936, the court said,

> "Defendant did ask for a continuance, but he did not show any necessity therefor. He did not show wherein it was unable to meet the facts pleaded by the amendment; it did not produce witnesses to contradict the evidence and made no contention that it could produce other evidence

on the question if granted a continuance. There was no showing of prejudice."

In *McCollum v Schubert,* 185 SW 2d 84, Kansas City Court of Appeals, 1944, the court said,

"The most that could be said for the amendment was that it constituted a material variance. While defendant filed an affidavit of surprise, it would appear from the record that there is no likelihood of defendant being able to produce any other witness than those he had at the trial and the court did not abuse its discretion in refusing to grant him a continuance."

In *Federal Life Ins. Co. v Rascoe,* 12 F 2d 693, CCA 6th 1926, the court held that where no evidence was introduced until two days after an order was entered transferring the cause from equity to law and a hearing was not concluded until the day thereafter, the court did not abuse its discretion, in denying the defendant's motion for a continuance for a week or more on the theory that the transfer of the cause and amendment of the complaint required testimony of defendant's officers who were then in Chicago. The court held that the presumption was in the absence of contrary proof, that the delay would be for convenience only and not because of necessity.

In *Druckman v Forsyth Furniture Lines Inc.,* 22 F 2d 59, CCA 4th 1927, the court said,

"It is unnecessary to cite the numerous decisions that hold that a continuance of a cause rests in the sound discretion of the trial court. The judge who has the cause before him is, of

> course, in much better position to determine whether an application, apparently fair on its face, is in reality not bona fide, but for purposes of delay, than an appellate tribunal could possibly be."

After examining the entire record, the court held that there was nothing in the record which would justify the conclusion that the discretion of the trial court had been abused.

We turn then to an examination of the probability of the appellant's actual surprise and the possibility of prejudice arising therefrom. Appellant contends that he was surprised by the filing of appellees' Second Amended Complaint. Such contention is belied by the unsolicited remark by Mr. Boggess:

> "Mr. McNabb, I presume you are alleging negligence now. Is that correct?" (T.R. 49.)

Appellant forthwith moved for a continuance, which was granted for a period of 24 hours, by the trial court, without objection. On the 8th day of May, 1951, the trial court convened and the appellant, being aware that plaintiff Phillips could not remain longer for the trial, (T.R. 50), requested a continuance for three days on the ground that there remains "some work for me to do to reduce my notes, etc. to a proper working order." (T.R. 53). Appellant would have this court believe that appellees perpetrated and prosecuted a nefarious scheme to thwart justice and prevent appellant from properly presenting his defense. Suffice it to say that if appellant were in fact surprised and prejudiced, such surprise resulted and

prejudice arose from appellant taking the witness stand and testifying as the first witness for the appellees. Appellant does not specify as error the action of the trial court in overruling his "nebulous objections" to having Douglas Heay called as the first witness for the appellees. (T.R. 57.) Appellees concur in appellant's belief that "experienced, educated and brilliant counsel are seldom surprised in the lay sense of the word." (Appellant's Brief 11.)

Appellant relies on the case of *Dispatch Laundry Co. v Employers Liability Assurance Corp. Ltd,* 1908, 105 Minn 384, 117 NW 506. In the *Dispatch Laundry* case an amendment was apparently made to plaintiff's complaint during the course of the trial. And a refusal in that instance to grant to the defendant a continuance was held abuse of the trial court's discretion and reversible error. Here appellant had a continuance for a twenty-four hour period, during which time he examined his expert witness, Dr. Richard Charles Ragle. He also consulted at length with Douglas Heay, the appellee. The court will note that the only expert witness called by appellant was Dr. Ragle. Counsel admits that "I spent roughly three hours with Prof. Ragle at the University of Alaska inquiring from him of his knowledge of vertical air currents from his experience in flying in Alaska." (T.R. 53.) Having spent that amount of time interviewing Prof. Ragle and having called no other expert witness, it is reasonable for this court to assume that either (1) it was the intention of the appellant to rely solely and entirely upon the testimony of this

expert witness or, (2) he was unable to secure any other person to act as a witness who concurred in Prof. Ragle's views. Certainly appellant should not now be heard to complain that he had an inadequate time to prepare his defense when he had, in fact, interviewed each of his witnesses prior to the time at which he requested a continuance.

Appellant would have this court believe that he had an inadequate amount of time in which to prepare for the cross-examination of the expert witnesses of appellees. It is submitted that counsel spent three hours with his expert witnesses on the 7th day of May, 1951, and was not called upon to examine the first of appellees' expert witnesses, Randall K. Acord, until 2:00 o'clock P. M. on the 9th day of May, 1951, or the second, Hawley N. Evans, until 2:35 o'clock P. M. on the 10th day of May and after his expert Ragle had testified.

It is submitted that the failure of appellant to request a continuance at the close of appellees' case, which request, if made, would have been granted by the court without objection from appellees as is indicated by the transcript, (T.R. 54), his failure to call any additional witnesses, the fact that appellant had interviewed all of his witnesses prior to trial, the testimony of the defendant, Douglas Heay, and the abrupt manner in which appellant rested his case, (T.R. 319), lead to the inescapable conclusion that the failure of the trial court to grant appellant's three day continuance resulted in no prejudice to his case

and, in fact, negative any suggestion, implication or statement that he was in fact surprised.

Whether appellee's amendment was in fact material is not relevant to this appeal; neither is the form and manner of the application for a continuance. The question before this court is whether the appellant was in fact surprised, and if so surprised, whether a refusal of the court to grant a further continuance was prejudicial to the presentation of appellant's case.

It is submitted that an examination of the record will adequately disclose that there was neither surprise nor prejudice resulting from the court's refusal to grant the requested continuance, but that, in fact, there was ample testimony to sustain a finding for the plaintiffs on either the tort or contract theories. If there were error committed by the trial court, it was in the court's requirement that the appellees elect one of their alternative theories. It is appellees' contention that the court could have found for the plaintiffs upon the theory of contract and that the requested continuance was for the purpose of delaying the trial of the cause until the November term, as the purpose of this appeal is to prevent and delay execution upon the judgment properly rendered for appellees.

Appellees herein patiently waited from the 20th day of September, 1950, until the 31st day of March, 1951, for the appellant to pay them the reasonable value of the aircraft as appellant had promised and agreed

to do. To recover the value of their aircraft, appellees were not only required at great expense and inconvenience to themselves to institute suit, but appellant attempted unsuccessfully to increase their loss by filing objections to plaintiffs' cost bill as appears on page 38 of the transcript.

Appellant further claims error in the refusal of the trial court to grant a new trial on the grounds that the trial court abused its discretion in refusing to grant the three day requested continuance. Appellees submitted that the trial court had opportunity to observe the demeanor of counsel for appellant, the appellant, his witnesses, the manner and nature of the cross-examination of appellees' witnesses as conducted by counsel for appellant and the absence of further requests for a continuance by appellant and the absence of any claim by appellant that he was surprised by any particular phase of the case as it was presented. Basing his decision upon personal observation, the trial court believed that substantial justice had been done by the parties and overruled the appellant's motion for a new trial.

It is the duty of this court to do substantial justice between the parties and to put an end to litigation. From an examination of the transcript it will be abundantly obvious to this court that a retrial of the issues herein will be concluded in a second judgment in favor of the appellees, from which it is reasonable upon the basis of our experience in this cause to anticipate an additional appeal and an addi-

tional trial. Ad Infinitum. An end to litigation and justice between the parties can only be acomplished by an affirmance by this court of the judgment below.

Dated, Fairbanks, Alaska,
February 20, 1952.

Respectfully submitted,
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